Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DENISE SANDERS
YOLANDA WHATLEY
WANDA WALKER

PETITIONERS

v.

VENTURE STORES, INC.

RESPONDENT

On Petition for Writ Of Certiorari To
The United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the federal rule of res judicata based upon diversity jurisdiction apply to bar plaintiffs from bringing a state cause of action, after dismissal of federal action, where district court, having independent diversity jurisdiction, denies plaintiffs' pending motion to amend to add state cause of action.

LIST OF PARTIES

All parties appear in the caption of case on the cover page.

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

Petitioners pray for writ of certiorari from an order entered by the Seventh Circuit, unpublished, and appearing as Appendix A to the petition.

JURISDICTION

The order of the United States Court of Appeals was entered on April 8, 1996. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 ¶ 1254 (1).

STATEMENT OF THE CASE

In February 1994, plaintiffs, Illinois citizens, filed an employment discrimination complaint under Title VII of the Civil Rights

Act of 1964, as amended, against defendant, a Missouri Corporation, doing business in the state of Illinois. In July 1994, defendant filed a Motion For Summary Judgment, alleging plaintiffs' complaint was time barred. In August 1994, plaintiffs filed a Motion to Amend to add counts, including a state cause of action for breach of employment contract. The District Court reserved ruling upon plaintiffs' motion, pending its ruling upon defendant's Motion For Summary Judgment.

In October 1994, the District Court granted defendant's Motion For Summary Judgment, and entered an order denying as moot, plaintiffs' pending Motion to Amend to add counts, including the state cause of action. Plaintiffs appealed the District Court's denial of their Motion to Amend, as moot, based upon Federal Rule 15(a) of the Civil Procedure Rules, and its mandate, that leave to amend shall be freely given when justice so requires. The Seventh Circuit affirmed in May 1995.

In June, 1995 plaintiffs filed their state cause of action for breach of employment contract, in the Illinois state court. In July 1995, defendant removed the state action, upon diversity of citizenship. On July 18, 1995 defendant filed a Motion to Dismiss the state cause under the doctrine of res judicata. The District Court granted defendant's motion.

Plaintiffs appealed on the ground that the doctrine of res judicata did not apply. Since, plaintiffs had attempted to raise all legal theories in their motion to amend.

SEVENTH CIRCUIT DECISION

The Court of appeals affirmed, stating plaintiffs' "failure to consider what claims they could have brought based upon the Court's independent diversity jurisdiction when the case was originally filed."

REASON FOR GRANTING THE WRIT

The Seventh Circuit's decision deprives plaintiffs, of the freedom to pursue their state claim in state court, after dismissal of the federal action.

The District Court, as stated by the Seventh Circuit, had "independent diversity jurisdiction," when the case was originally filed. Plaintiffs attempted to raise the state cause of action for breach of employment contract during the pendency of the federal action. The District Court refused to hear the state claim, denying as moot, the pending motion to amend, after granting defendant's summary judgment motion on the Title VII Count, on a time bar issue.

Under the District Court's independent diversity jurisdiction, it was obligated to hear plaintiff's state claim. *Shavers v. F.W. Woolworth Co. 840 F.2d 1361 (distinguished).* In Shavers, plaintiff made no amendment in the federal court, to present the state cause of action to the District Court. In the instant case, plaintiffs did make an amendment presenting the state cause of action to the District Court.

The doctrine of res judicata requires that plaintiffs raise all legal theories in one proceeding. The doctrine of res judicata should not be used to deprive plaintiffs of the freedom to bring their state cause of action in State Court, where the District Court refused to hear the state cause of action raised by plaintiffs.

The Court of Appeals decided that the doctrine of res judicata applied because plaintiffs did not file their state cause of action "at the time of filing" the original cause of action. The doctrine of res judicata requires, merely, that all claims be raised in a single proceeding. The doctrine does not require that all claims be raised "at the time of filing" the proceeding.

Under the position taken by the Court of Appeals, plaintiffs who do not file all claims "at the time of filing," are deprived of the freedom to pursue their state cause of action after dismissal of the federal action. The unfairness of this decision is that it only applies

to plaintiffs where diversity jurisdiction exists. Plaintiffs raising a pendent state cause of action, at any time, where diversity jurisdiction does not exist, and where the District Court refuses to hear the state claim, are free to pursue their state cause of action, in state court, after dismissal of the federal action.

The Seventh Circuit's decision infringes upon the rule that plaintiff are free to pursue their state claim, where the District Court refuses to hear the state action, and treats plaintiffs unequally based upon whether or not defendant can allege diversity jurisdiction.

CONCLUSION

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted

Patricia E. Bender
Attorney for Petitioners
July 5, 1996

APPENDIX A

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Argued March 29, 1996

Decided April 8, 1996

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

DENISE SANDERS, YOLANDA WHATLEY, and WANDA WALKER,	]	Appeal from the United
	]	District Court for the
	]	Northern District of
	]	Illinois, Eastern
Plaintiffs-Appellants,	]	Division
	]	
No. 95-3743 v.	]	No. 95 C 3937
	]	
VENTURE STORES, INC.,	]	Elaine E. Bucklo, Judge
	]	
Defendant-Appellee.	]	

ORDER

This is the second time that the plaintiffs, Denise Sanders, Yolanda Whatley, and Wanda Walker, have sued in federal court to complain about Venture's decision to terminate their employment in

early 1992. In the first case, they filed an action that asserted claims only under Title VII of the Civil Rights Act of 1964, 42 U.S.C. ¶ 2000 et seq. After Venture filed a motion for summary judgment, and after the cut-off date for discovery, they moved to amend the complaint under Fed. R. Civ. P. 15(c) to add counts under 42 U.S.C. ¶ 1981 and 1985(3) and under state wrongful discharge law. The district court entered summary judgment for Venture and denied the motion to amend the complaint as moot. On appeal from the latter ruling, this Court found that an amendment of the complaint at that late date would have caused undue delay in the case and prejudice to Venture, and thus that the district court's denial of leave to amend was proper. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771 (7th Cir. 1995).

Plaintiffs then turned around and filed a new complaint against Venture in the Circuit Court of Cook County, Illinois, alleging that Venture breached its contracts with them in the same 1992 termination decision. On July 7, 1995, Venture removed the suit to federal court on the basis of diversity of citizenship. See 28 U.S.C. ¶ 1441(b). It alleged that Venture is a Missouri corporation with its principal place of business in Missouri, all three plaintiffs are citizens of Illinois, and the amount in Controversy exceeds $50,000. Venture then raised the affirmative defense of res judicata, or claim preclusion. Relying on this Court's decisions in *Smith v. City of Chicago*, 820 F.2d 916 (7th Cir. 1987), *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988), and *Brzostowski v. Laidlaw Waste Systems*, 49 F.3d 337 (7th Cir. 1995), the district court found that the suit was barred and dismissed the complaint.

We agree that the claims raised in the second suit could have been presented the district court the first time around, and thus that principles of claim preclusion prevent it from going forward here. As the district court recognized, federal law governs the preclusive effect of a federal judgment. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289 n.4 (7th Cir. 1993); *Barnett v. Stern*, 909 F.2d 973, 977

(7th Cir. 1990). Claim preclusion exists when the following three elements are present: (1) a judgment "on the merits" in an earlier action, (2) an identity of parties or privies in the two suits, and (3) an identity of the claim in the two suits. See *Brzostowski,* 49 F.2d at 338. If these elements are satisfied, claim preclusion not only prevents the party from relitigating those issues that were actually raised in the prior suit, but also all issues that could have been raised.

Here, we have no trouble concluding that all three criteria have been fulfilled. The district court's summary judgment in the first case was based on the untimeliness of the plaintiffs' Title VII action for purposes of 42 U.S.C. ¶ 2000e-5(f)(1). Timeliness for these purposes is a reason "on the merits." See *Shaver,* 840 F.2d at 1365; *Smith,* 820 F.2d at 920. The parties are plainly the same. Finally, the claims arise out of the same "core of operative facts," or in the words of the *Restatement (Second) of Judgments* ¶ 24 (1982), the same transaction or occurrence. See *In the Matter of Energy Cooperative, Inc.,* 814 F.2d 1226, 1230-31 (7th Cir.), *cert denied,* 484 U.S. 928 (1987). In the first case, plaintiffs tried to challenge their 1992 terminations using Title VII as the legal theory, and now they are trying to attack the identical event under state contract law. A change in legal theory does not have the effect of making two transactions out of one. *Doe v. Allied-Signal, Inc.,* 985 F.2d 908, 913 (7th Cir. 1993); *Car Carriers, Inc., v. Ford Motor Co.,* 789 F.2d 589 (7th Cir. 1988).

Although Venture argued here that the plaintiffs were seeking a policy-based exception to claim preclusion rules, the plaintiffs explicitly disclaimed any such intention at oral argument. Instead, they believe that the district court's decision to deny their amendment in the first case means, as a matter of law, that they did not have an opportunity to litigate those claims before. This is particularly true, they argue, because the jurisdictional theory on which they relied was supplemental jurisdiction, see 28 U.S.C. ¶ 1367, and it is clear that district courts have discretion to dismiss supplemental state law claims when the federal counts are disposed of early in the liti-

gation. *Wright v. Associated Insurance Co.*, 29 F.3d 1244, 1251 (7th Cir. 1994). *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

There are two problems with plaintiffs' arguments. First, this Court considered nearly the identical situation in *Shaver*, and it found that claim preclusion barred the second suit. There a former employee initially brought a federal age discrimination suit with pendent state law claims, and age discrimination action was dismissed as untimely. The employee then returned to state court with a breach of contract suit, which the employer (as here) removed to federal court on diversity grounds. This Court found that claim preclusion barred the second action, because both cases arose out of the same core operative facts, the parties were the same, and the existence of diversity jurisdiction made it clear that the contract claims could have been raised in the first action. *Brzostowski* recently reaffirmed *Shaver* on similar facts. Plaintiffs here could not prevail unless we were willing to overrule those two prior cases. Plaintiffs' second problem is practical. The reason their contract claims were not before the court in the first case had nothing to do with the court's rejection of their amended complaint. They simply failed to consider what claims they *could* have brought based upon the court's independent diversity jurisdiction when the case was originally filed. Unlike a claim based on supplemental jurisdiction, for which discretion exists to dismiss without prejudice in appropriate circumstances, a district court has a duty to entertain claims for which proper diversity jurisdiction exists.

Plaintiffs have offered no reason why we should reject *Shaver* and Brzostowski, nor can we think of any ourselves. Indeed, if we were to allow this suit to go forward, it would render our earlier decision finding that the district court was correct to deny the amendment to the first complaint a practical nullity. The district court properly found that they are barred by claim preclusion from raising additional claims that were part of the same core of operative facts, which they plainly could have raised as part of their first suit. We therefore **AFFIRM** the judgment of the district court.

APPENDIX B

In the United States District Court for the Northern District of Illinois
Eastern Division

DENISE SANDERS, YOLANDA WHATLEY, and WANDA WALKER	]	
Plaintiffs	]	
v.	]	Case No. 95 C 3937
VENTURE STORES, INC.,	]	
Defendant	]	

MEMORANDUM OPINION AND ORDER

On June 7, 1995, plaintiffs, Denise Sanders, Yolanda Whatley and Wanda Walker, filed a complaint against defendant, Venture Stores, Inc. ("Venture") in the Circuit Court of Cook County. The complaint alleges that Venture breached its contracts with the plaintiffs by terminating their employment. On July 7, 1995, Venture removed the lawsuit to federal court pursuant to 28 U.S.C. ¶ 1441 on the basis of diversity of citizenship.

In February, 1994, the plaintiffs, three African-American women, filed Case No. 94 C 1162 against Venture in this district, alleging that Venture's termination of their employment was discriminatory on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. ¶ 2000e, *et seq*. Venture brought a motion for summary judgement, which Judge Marvin E. Aspen referred to Magistrate Judge Rebecca R. Pallmeyer, asserting that the plaintiffs' claims were time-barred under 42 U.S.C. ¶ 2000e-5(f) (1) (court complaint

is to be filed within 90 days after receipt of the Equal Employment Opportunity Commission "right-to-sue" letter). Subsequently, the plaintiffs moved to amend their complaint to add claims, including state law breach of contract claims, and parties. Judge Aspen took the plaintiff's motion to amend under advisement pending the magistrate judge's ruling on Venture's summary judgment motion. Magistrate Judge Pallmeyer then recommended that the motion for summary judgment be granted on the grounds that the plaintiffs' Title VII claims were untimely filed. Judge Aspen accepted the magistrate judge's recommendation, granted Venture's summary judgment motion and denied the plaintiff's motion to amend their complaint as moot. *See Sanders v. Venture Stores, Inc.*, 56 F. 3d 771, 772 (7th Cir. 1995). The plaintiffs appealed, arguing that Judge Aspen erred in denying their motion to amend. *Id.* at 773. The Court of Appeals affirmed on the basis that granting the motion to amend would cause "undue delay and prejudice." *Id.* at 775-76.

Venture has filed a motion to dismiss the present complaint in which it contends that Judge Aspen's order dismission the plaintiffs, earlier case bars this lawsuit under the doctrine of *res judicata*. For the reasons discussed below, Venture's motion is granted.

Res Judicata

The judgment that Venture argues precludes this action was that of a federal court, and therefore, federal rules of *res judicata* govern. *Havoco of America, Ltd. v. Freeman, Atkins & Coleman*, 58 F. 3d 303, 307 n.7 (7th Cir. 1995). For *res judicata* to apply, the following three elements must exist:

> (1) a final judgment on the merits in an earlier action, (2) an identity of the cause of action in both the earlier and later suit, and (3) an identity of parties or privies in the two suits.

Smith v. City of Chicago, 820 F.2d 916, 917 (7th Cir. 1987). It is undisputed that the first and third elements of *res judicata* exist in this case. Indeed, the plaintiffs' earlier complaint against Venture

was dismissed for failure to adhere to Title VII's limitations bar expressed in 42 U.S.C. ¶ 2000e-5 (f) (1). A dismissal for failure to comply with a statute of limitations is "on the merits" for the purposes of *res judicata*. *Id.* at 918-919; *American National Bank & Trust Company v. City of Chicago*, 826 F.2d 1547, 1553 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987). As observed by the Court of Appeals,

> [t]hat [a plaintiff] bolixed his opportunity [to receive an adjudication from the court] by starting the suit too late or failing to prosecute it properly does not justify exposing the defendant to another round.

American National Bank & Trust Company v. City of Chicago, supra, 826 F. 2d at 1553. Accordingly, a final judgment on the merits was rendered in the previous action between the parties to this lawsuit.

The second element of res judicata, an identity of causes of action in the earlier and later suits, is satisfied when

> a single core of operative facts form[ ] the basis of both lawsuits. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action.

Prochotsky v. Baker & McKenzie, 966 F.2d 333, 335 (7th Cir. 1992). All claims arising out of an event that causes injury "must be brought in one suit or be lost." *Id.* Both the plaintiffs' breach of contract an Title VII claims arise out of Venture's discharging them from their jobs. The Court of Appeals has held that similar claims constituted one cause of action for the purposes of *res judicata*.

In *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1363 (7th Cir. 1988), cert. denied, 488 U.S. 856 (1988), the plaintiff filed a complaint alleging that his discharge violated the Age Discrimination in Employment Act ("ADEA") and joining pendent state law

claims. Shaver's ADEA suit was not timely filed and was dismissed, and the district judge refused to exercise pendent jurisdiction over the remaining state llaw claims. *Id.* Shaver failed to allege diversity of citizenship, which apparently existed, as a jurisdictional ground for those claims. *Id.* at 1363, 1364 n.1. Instead, Shaver filed a second lawsuit in state court alleging only state law breach of contract and negligent employment termination claims, which was removed to federal court on the basis of diversity of citizenship. *Id.* The Court found that Shaver's layoff due to the defendant's liquidation of one of its divisions gave rise to both of Shaver's lawsuits, and therefore, the suits were identical causes of action under res judicata principles. *Id.* at 1365. Consequently, the Court of Appeals affirmed the district court's dismissal of Shaver's suit. Id. at 1368.[1] *See also Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337, 338-39 (7th Cir. 1995) (Brzostowski's lawsuit alleging that his discharge violated his employment contract with Laidlaw was dismissed; res judicata barred Brzostowski's subsequent suit under the ADEA alleging that Laidlaw unlawfully terminated his employment on the basis of his age because "the firing of Brzostowski by Laidlaw constitutes the nucleus of factual allegations giving rise to both suits.") Likewise, in this case, Venture's discharge of the plaintiffs is the core of operative fact underlying plaintiffs' Title VII and breach of contract claims because resolution fo both complaints would depend on whether Venture adhered to its obligations under either the federal statute or the contract when it terminated the plaintiffs' employment. See *id.* at 339. Accordingly, the plaintiffs' Title VII and state law breach of contract claims are identical causes of action for *res judicata* purposes.

---

[1] In Shaver, the fact that the plaintiff had presented the state claims to the district judge, who declined to exercise jurisdiction over them, did not preclude res judicata. Thus, the fact that the plaintiffs in this case attempted to raise the present allegations in their prior lawsuit has no bearing on the issues.

Finally, the plaintiffs' motion to amend their original complaint itself states that "the requested amended pleadings arose out of the same conduct, transaction, and occurance [sic] set forth in the original pleading filed in February of 1994." Motion to Amend, ¶ 3. This is noteworthy because the state law breach of contract claims that the plaintiffs wished to add to their first complaint are virtually identical to the claims in the present action.

The plaintiffs here are in a comparable position to the plaintiffs in *Shaver*, whose mistake in not alleging in his initial lawsuit diversity of citizenship as the jurisdictional basis for his state claims cost him the ability to litigate those claims. When the plaintiffs brought their Title VII lawsuit, they had the opportunity to present their breach of contract allegations. The plaintiffs lost that opportunity by delaying seeking leave to amend their complaint to add to those allegations, *see Sanders v. Venture Stores, Incorporated, supra*, 56 F.3d at 775, and will not now be afforded a second bite at the apple.

Conclusion

For the reasons stated herein, Venture's motion to dismiss the plaintiffs' complaint is granted.

ENTER ORDER:

/s/ Elaine E. Bucklo
United States District Judge

Dated: October 19, 1995

Supreme Court, U.S.
FILED
OCT 18 1996
CLERK

No. 96-432

In The

Supreme Court of the United States

October Term, 1996

DENISE SANDERS, YOLANDA WHATLEY, and WANDA WALKER,

Petitioners,

v.

VENTURE STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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October 18, 1996

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QUESTION PRESENTED

This case presents the question of whether the doctrine of res judicata bars an action asserting breach of employment contract claims arising from the termination of an employee's employment where there is a previous judgment on the merits in a prior action asserting discrimination claims arising from the termination of the employee's employment.

PARTIES TO THE PROCEEDING

The petitioners are Denise Sanders, Yolanda Whatley, and Wanda Walker, all former employees of the respondent, Venture Stores, Inc.

The respondent is Venture Stores, Inc., a Missouri corporation with its principal place of business in Missouri. The respondent is in the business of retail sales of consumer goods.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, VENTURE STORES, INC. (hereinafter referred to as "Venture"), by and through its attorneys, Seyfarth, Shaw, Fairweather & Geraldson, hereby files its brief in opposition to the petition for writ of certiorari filed by Petitioners Denise Sanders, Yolanda Whatley, and Wanda Walker (hereinafter referred to collectively as the "Plaintiffs").

By way of summary, in 1994, Plaintiffs brought a federal court action alleging that the termination of their employment by Venture violated Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e *et seq.* Judgment was granted to Venture in that suit based on the limitations period provided in 42 U.S.C. § 2000e-5(f)(1). Subsequently, Plaintiffs brought a state law action for breach of contract challenging the termination of their employment. This subsequent action was dismissed on res judicata grounds.

Res judicata bars a breach of contract action brought by former employees challenging the termination of their employment where there is a judgment on the merits between the same parties in a previous Title VII discrimination action which also challenged the termination of their employment. The Seventh Circuit's decision appropriately affirmed the dismissal of the second action brought by Plaintiffs against Venture. The decision below follows the precedent of the Supreme Court, presents no conflict with a decision of another United States court of appeals, and does not depart from the accepted and usual

course of judicial proceedings. Accordingly, the Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

On February 24, 1994, Plaintiffs brought suit against Venture alleging that Venture's termination of their employment violated Title VII. Venture's answer to the complaint presented as an affirmative defense Plaintiff's failure to file suit within 90 days after receipt of right to sue letters from the Equal Employment Opportunity Commission ("EEOC") as required by 42 U.S.C. § 2000e-5(f)(1). On July 7, 1994, Venture filed a motion for summary judgment based on Plaintiffs' failure to file suit within this limitations period.

On August 31, 1994, "after discovery was completed, after Venture had filed its motion for summary judgment, after the district court indicated its inclination to grant the summary judgment and after it referred the matter to a magistrate judge," Plaintiffs filed a motion to amend their complaint to add several new counts, including state law breach of contract claims. *See Sanders v. Venture Stores, Inc. ("Sanders I")*, 56 F.3d 771, 775 (7th Cir. 1995). On October 24, 1994, the District Court granted summary judgment to Venture under Fed. R. Civ. P. 56, and denied the Plaintiffs' motion to amend their complaint. Plaintiffs subsequently appealed the District Court's denial of their motion to amend.

The Seventh Circuit affirmed the District Court in *Sanders I*, 56 F.3d 771 (7th Cir. 1995). The Seventh Circuit found that amendment of the complaint at the time it was

filed would have compelled Venture "to incur additional discovery costs, and there would be undue delay and prejudice to the parties and to the court." *Id.* at 775. Accordingly, consistent with the Supreme Court's decision in *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962), the Seventh Circuit found that denial of the motion to amend was a proper exercise of the District Court's discretion and affirmed the judgment.

On June 7, 1995, two weeks after the Seventh Circuit issued its decision in *Sanders I*, Plaintiffs filed a new action in Illinois state court asserting breach of contract claims based on the termination of their employment. These were the same claims for which amendment had been ruled untimely in *Sanders I*. Venture removed the new action to federal court on the basis of diversity jurisdiction, and filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on the grounds of res judicata. Relying on the Seventh Circuit's decisions in *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988), and *Brzostowski v. Laidlaw Waste Systems*, 49 F.3d 337 (7th Cir. 1995), the District Court agreed and dismissed the second complaint, concluding that Plaintiffs should "not now be afforded a second bite at the apple." *Sanders v. Venture Stores, Inc.*, 899 F. Supp. 387, 389 (N.D. Ill. 1995).

Plaintiffs again appealed to the Seventh Circuit. This time they asserted that the doctrine of res judicata should not apply to bar their subsequent action, because in their earlier action they were denied leave to amend their complaint to add the contract claims. In rejecting Plaintiffs' arguments, the Seventh Circuit held that the new suit plainly met the three elements of res judicata, or

claim preclusion: (1) a judgment on the merits in the earlier action, (2) an identity of parties in the two suits, and (3) an identity of the claims in the two suits. *Sanders v. Venture Stores, Inc. ("Sanders II")*, Docket No. 95-3743, Slip Op. at 2 (7th Cir., April 8, 1996). Further, the Seventh Circuit rejected Plaintiffs' effort to carve an exception to the res judicata doctrine as contrary to settled precedent in the circuit, specifically *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988), and *Brzostowski v. Laidlaw Waste Systems*, 49 F.3d 337 (7th Cir. 1995). In so doing, the Seventh Circuit observed that Plaintiffs' inability to litigate their contract claims was attributable only to their own "fail[ure] to consider what claims they *could* have brought . . . when the case was originally filed." *Sanders II*, Slip Op. at 3 (italics in original). Accordingly, the Seventh Circuit affirmed the judgment of the District Court.

Plaintiffs now petition for writ of certiorari of the decision in *Sanders II*.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FOLLOWED THE CONTROLLING PRECEDENT OF THE SUPREME COURT.

The doctrine of res judicata as developed by the United States Supreme Court provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980); *see also Federated*

Department Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981). An action will be barred by res judicata where the following three elements are present: (1) a judgment on the merits in an earlier action; (2) an identity of parties or privies in the two suits; and (3) an identity of the cause of action between both suits. *Id.* at 399, 101 S. Ct. at 2428; *see also Wade v. Hopper*, 993 F.2d 1246, 1252 (7th Cir.), *cert. denied*, 510 U.S. 868, 114 S. Ct. 193 (1993); *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir.), *cert. denied*, 488 U.S. 856, 109 S. Ct. 145 (1988).

In the present case, the Seventh Circuit applied each of these elements to find that Plaintiffs' new complaint was barred by the res judicata doctrine. *Sanders II*, Slip Op. at 2. Plaintiffs presented no argument below that these elements were not present, and do not now argue that the Seventh Circuit erred in so finding.

The Supreme Court has repeatedly reaffirmed the importance of the doctrine of res judicata in the American system of justice. As stated by the Court in *Allen v. McCurry*, "res judicata . . . relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." 449 U.S. at 94, 101 S. Ct. at 415 (1980); *see also Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979). Accordingly, the Court has strongly rejected efforts by the lower federal courts to carve out policy-based exceptions to the doctrine of res judicata – holding instead that public policy is best served by application of the rule where the elements are present. *See, e.g., Moitie*, 452 U.S. at 399-401, 101 S. Ct. at 2438-40 (1981); *see also Shaver*, 840 F.2d at 1364 (7th Cir.

1988) ("Once a litigant has satisfied the prongs of the test, a later suit should be barred since there is little, if any, room left for making further policy arguments.").

In the present case, Plaintiffs seek an exception to the application of the res judicata doctrine in cases where a party attempts but fails to advance a claim in the earlier litigation. The Court should decline to entertain the creation of such an exception, and deny the petition for writ of certiorari.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL AS TO THE APPLICATION OF THE RES JUDICATA DOCTRINE.

(A) An Action Brought To Contest An Employee's Discharge Is Barred By A Previous Action Which Contested The Discharge.

For purposes of res judicata, a claim in a second suit is considered the "same claim" as one brought in an earlier suit if it arises from the "same transaction" or "a single core of operative facts." *See Kale v. Combined Insurance Co. of America*, 924 F.2d 1161, 1167 (1st Cir.), *cert. denied*, 502 U.S. 816, 112 S. Ct. 69 (1991); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38-39 (2d Cir. 1992), *cert. denied*, 506 U.S. 1053, 113 S. Ct. 977 (1993); *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991); *In re Varat Enterprises*, 81 F.3d 1310, 1316 (4th Cir. 1996); *In re Air Crash at Dallas/Ft. Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988); *J.Z.G. Resources, Inc. v. Shelby Insur. Co.*, 84 F.3d 211, 215 (6th Cir. 1996); *Shaver*, 840 F.2d 1361, 1365 (7th Cir. 1988); *In re International Nutronics, Inc.*, 28 F.3d 965, 970-71 (9th Cir. 1994); *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268,

1275 (10th Cir. 1995); *see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883, 1896 n.22 (1982) (noting the then-recent trend of applying res judicata "to bar claims arising from the same transaction even if brought under different statutes").

There is no conflict among the federal courts of appeal that the various claims an employee might raise relative to the termination of her employment arise out of the same transaction or core of operative facts and thus constitute a single cause of action for res judicata purposes. *See, e.g., Kale v. Combined Insur. Co. of America*, 924 F.2d 1161 (1st Cir. 1991); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2d Cir. 1992); *Hogue v. Royse City, Texas*, 939 F.2d 1249 (5th Cir. 1991); *Cemer v. Marathon*, 583 F.2d 830 (6th Cir. 1978); *Shaver*, 840 F.2d 1361 (7th Cir. 1988); *Brzostowski*, 49 F.3d 337 (7th Cir. 1995); *Mills v. Des Arc Convalescent Home*, 872 F.2d 823 (8th Cir. 1989); *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir.), *cert. denied*, 506 U.S. 832, 113 S. Ct. 93 (1992).

(B) No Exception To The Res Judicata Doctrine Is Created By An Attempted, But Failed Effort To Bring Claims In An Earlier Action.

"Res judicata bars not only those issues which were actually raised in a prior suit, but also all issues which could have been raised in that action." *Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337, 338 (7th Cir. 1995) (citing *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir. 1988)). In the decision below, the Seventh Circuit merely reaffirmed this rule of law, stating that Plaintiffs could have brought their contract claims in the earlier

action but failed to do so because they "failed to consider what claims they *could* have brought . . . when the case was originally filed." *Sanders II*, Slip Op. at 3 (italics in original). Plaintiffs agree with the Seventh Circuit's statement of the applicable rule of law. *Petition for Writ of Certiorari* at 2. Nonetheless, they argue that the rule should not apply, because they attempted in the first suit to raise the contract claims advanced in the second suit.

Plaintiffs omit the important fact that, while they *attempted* to raise their contract claims by a motion to amend their first complaint, they *failed* in this effort. Plaintiffs ignore the decision of the Seventh Circuit in *Sanders I* that their attempt was inexcusably delayed and would have caused undue prejudice to Venture and the courts. *See Sanders I*, 56 F.3d 771, 774 (1995). As stated by the Seventh Circuit in *Sanders II*, Plaintiffs could have avoided the denial of their motion to amend in *Sanders I* (and avoided the predicament in which they find themselves) had they not "failed to consider what claims they could have brought based upon the court's independent diversity jurisdiction when the case was originally filed." *Sanders II*, Slip Op. at 3. Plaintiffs acted at their peril by waiting to seek leave to amend their complaint until after discovery closed, after Venture filed its motion for summary judgment, and after the District Court expressed its inclination to grant the summary judgment. The mere fact, however, that Plaintiffs "bollixed [their] opportunity by . . . failing to prosecute [their case] properly does not justify exposing the defendant to another round." *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547, 1553 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S. Ct. 489 (1987).

In this regard, the Seventh Circuit's decision in this case is wholly consistent with prior decisions in *Shaver*, 840 F.2d 1361 (7th Cir. 1988), and *Kale*, 924 F.2d 1161 (1st Cir. 1991). In *Shaver*, the plaintiff-employee initially brought suit asserting federal age discrimination and pendent state law claims. The age discrimination claim was subsequently dismissed as untimely. Further, the plaintiff had failed to raise diversity as a jurisdictional basis for the state law claims, and the federal district court declined to exercise pendent jurisdiction over the state law claims. Subsequently, the plaintiff-employee brought a new breach of contract claim in Wisconsin state court. The employer removed the action to federal district court on diversity grounds, and the district court granted judgment to the employer on the contract claim.

On review, the Seventh Circuit affirmed on res judicata grounds, holding that both the contract and the discrimination claims arose out of "the same core of operative facts" (i.e., the employer's liquidation and the employee's layoff), and thus "constitute[d] identical causes of actions for res judicata purposes." *Shaver*, 840 F.2d at 1365. As emphasized by the Seventh Circuit, "res judicata operates as a bar to the litigation of matters which could have been raised in a prior proceeding . . . [and] prevents the splitting of a single cause of action and the use of several theories of recovery as the basis for separate suits." *Id.* at 1365. The Seventh Circuit further rejected plaintiff's efforts to argue that the res judicata doctrine should not apply because of policy concerns. *Id.* at 1365-66. Contrary to plaintiff's assertions, the Seventh Circuit (echoing the Supreme Court) emphasized the important policies that the res judicata doctrine

upholds and found that the new action was barred by "both the strict test of and the policy behind the res judicata doctrine." *Id.* at 1367-68.

Likewise, in almost identical circumstances in *Kale*, 924 F.2d 1161 (1st Cir.1991), the United States Court of Appeals for the First Circuit held that a judgment in one federal suit will act as res judicata as to a later suit asserting state law claims where the plaintiff tried, but failed, to assert the state law claims in the first suit. In *Kale*, the plaintiff-employee first filed suit in federal court pleading federal jurisdiction and alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* To this suit, he added several state law claims asserting only pendent jurisdiction. Subsequently, plaintiff's federal age discrimination claim was held to be time-barred. Accordingly, the district court granted summary judgment to the defendant-employer on that claim, and dismissed "without prejudice" the pendent state law claims. *Id.* at 1163.

After plaintiff's unsuccessful appeal of the adverse judgment on his age discrimination claim, he then filed a new suit in Massachusetts state court alleging "a tsunami of state-law claims." *Id.* at 1164. The defendant-employer removed the suit to federal district court on diversity grounds, and moved to dismiss based on the res judicata effect of the first litigation. The district court granted the motion to dismiss.

On review, the First Circuit found that the three elements of the res judicata doctrine had been met — a judgment on the merits, an identity of parties, and an identity of causes of action. *Id.* at 1165-66. In the latter

regard, the court found that all of the claims in the second suit arose from "the same transactional hub" as in the first suit (i.e., "defendant's unilateral termination of the plaintiff's employment"), and thus there was an identity of causes of action for res judicata purposes. *Id.* at 1166. Relying on the Seventh Circuit's decision in *Shaver*, the First Circuit accordingly affirmed the district court's judgment below, "holding that when a plaintiff pleads a claim in federal court, he must, to avoid the onus of claim-splitting, bring all related state claims in the same lawsuit so long as any suitable basis for subject-matter jurisdiction exists." *Id.* at 1165, 1166-67. Rejecting the plaintiff's plea that such application of the res judicata doctrine resulted in an injustice to him, the First Circuit aptly opined, "[t]here is no unfairness . . . in declining to extricate the plaintiff from a self-dug hole." *Id.* at 1167.

The fact that Plaintiffs belatedly attempted to amend their complaint in *Sanders I* to bring their contract claims does not aid their cause. Rather, Plaintiffs in this case stand in shoes much like those of the plaintiffs in *Shaver* and *Kale*.

Here, the District Court granted judgment to Venture on federal discrimination claims and properly rejected the plaintiffs' efforts to bring state law claims as part of the initial action. In *Shaver* and *Kale*, the district courts granted judgment to the defendant-employers on federal discrimination claims and properly dismissed the plaintiffs' state law claims. In the present case, Plaintiffs were unable to assert their contract claims in the first action because their motion to amend was untimely. In *Shaver* and *Kale*, the plaintiffs were unable to bring their state law claims in the first action because they failed to timely

assert an appropriate jurisdictional basis for the district court to entertain such claims.

Here, as in *Shaver* and *Kale*, Plaintiffs' failed effort to bring their state law claims in the earlier proceeding does not alter the res judicata effect of that proceeding. Here, as in *Shaver* and *Kale*, the later suit is precluded.

CONCLUSION

WHEREFORE, based on the foregoing facts, arguments, and authorities, Respondent Venture Stores, Inc., respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

Venture Stores, Inc.

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